RECENT CASES

CIVIL PROCEDURE — CLASS ACTIONS — NINTH CIRCUIT HOLDS RULE 23 DOES NOT REQUIRE PROOF OF ADMINISTRATIVE FEASIBILITY. — *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

Class actions are a means for aggregating claims that are too small to incentivize individual litigation. Enabling compensation is one clear benefit of class actions, but aggregate litigation also serves a consonant public purpose of deterring unlawful conduct. By making small claims economically feasible to litigate, class actions enlist private attorneys as law enforcement agents. However, where claims are frivolous and damages are high, these cases create coercive settlement pressure.[1]

In part to filter out classes that are unlikely to succeed on the merits, courts must conduct a "rigorous analysis" of Rule 23(a)'s prerequisites before certifying a class.[2] Plaintiffs must demonstrate that a class (1) is sufficiently numerous so that joinder is impracticable, and (2) raises a common question of law or fact; and that the representative (3) alleges claims that are typical of class claims, and (4) can adequately represent the class.[3] In monetary-damage actions, Rule 23(b)(3) additionally requires that class-wide common issues predominate over individual issues.[4] But some courts impose an additional prerequisite that does not appear in the text of Rule 23. Under the Third Circuit's version of "administrative feasibility" doctrine, plaintiffs must propose a reliable means for ascertaining the identity of all class members before the class can be certified.[5] Because most individuals who purchase inexpensive products in stores do not keep itemized receipts and cannot prove their purchase, this requirement typically prevents those consumers from becoming certified as a class. Recently, in *Briseno v. ConAgra Foods, Inc.*,[6] the Ninth Circuit declined to adopt administrative feasibility as a standalone requirement for class certification.[7] Although *Briseno* deftly analyzed a number of important arguments against administrative feasibility, it did not consider a fundamental problem with that doctrine: no realistic alternative to consumer class actions could effectively replicate their role as a law enforcement

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[1] *See, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.).

[2] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011); *id.* at 350–51.

[3] FED. R. CIV. P. 23(a).

[4] *Id.* at 23(b)(3).

[5] *See, e.g.*, Carrera v. Bayer Corp., 727 F.3d 300, 305–07 (3d Cir. 2013).

[6] 844 F.3d 1121 (9th Cir. 2017).

[7] *Id.* at 1126. This requirement is sometimes referred to as "ascertainability," but that term refers to a broader concept that includes other, less disputed requirements. *Id.* at 1124 n.3. *See generally* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:1 (5th ed. 2016).

mechanism. For this reason, a standalone administrative feasibility requirement would seriously undermine much of consumer protection law and render some potential defendants judgment-proof when they cause a small amount of harm to a large number of people.

Briseno is a consumer class action. ConAgra Foods manufactured and sold Wesson Oils, a brand of cooking oil it advertised as "100% Natural."[8] However, ConAgra allegedly made Wesson Oils with genetically modified organisms, which might not qualify as natural.[9] Robert Briseño filed one of eleven class actions against ConAgra alleging it had deceived consumers into believing Wesson was 100% natural.[10] In 2011, the Judicial Panel on Multidistrict Litigation consolidated the actions before Judge Morrow of the U.S. District Court for the Central District of California.[11] Under the laws of eleven states, the buyers alleged violation of consumer protection statutes, breach of express and implied warranties, and unjust enrichment.[12] After the court dismissed some of these claims in 2012, the action proceeded through discovery, and in 2014, Briseño moved for class certification.[13]

ConAgra, citing the Third Circuit case *Carrera v. Bayer Corp.*,[14] argued against class certification because Briseño could not present an administratively feasible means for ascertaining who had bought Wesson Oil during the class period.[15] The Third Circuit's doctrine, which has caused a deep circuit split,[16] is rooted in three principles. First, the administrative feasibility requirement "eliminates serious administrative burdens . . . by insisting on the easy identification of class members."[17] It also "protects absent class members by facilitat-

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[8] *In re* ConAgra Foods Inc., 908 F. Supp. 2d 1090, 1095 (C.D. Cal. 2012).

[9] *Id.*

[10] *See In re* ConAgra Foods, Inc., 90 F. Supp. 3d 919, 939 (C.D. Cal. 2015).

[11] *See In re* Wesson Oil Mktg. & Sales Practices Litig., 818 F. Supp. 2d 1383 (J.P.M.L. 2011).

[12] *In re ConAgra Foods*, 90 F. Supp. 3d at 939–40.

[13] *See id.* at 938–39.

[14] 727 F.3d 300 (3d Cir. 2013).

[15] Defendant ConAgra Foods, Inc.'s Memorandum of Points and Authorities in Opposition to Plaintiffs' Amended Motion for Class Certification at 25–26, *In re ConAgra Foods*, 90 F. Supp. 3d 919 (No. 2:11-cv-05379-MMM-AGR).

[16] The Fourth Circuit cited the Third Circuit's doctrine in finding a putative class presented too many "administrative barrier[s]" to merit certification. *See* EQT Prod. Co. v. Adair, 764 F.3d 347, 358–60 (4th Cir. 2014). The Second and Eleventh Circuits have applied the doctrine in unpublished opinions. Leyse v. Lifetime Entm't Servs., LLC, Nos. 16-1133-cv, 16-1425-cv, 2017 WL 659894, at *2 (2d Cir. Feb. 15, 2017); Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 947–49 (11th Cir. 2015). However, the Sixth, Seventh, and Eighth Circuits have held that plaintiffs need not prove administrative feasibility at class certification. *See* Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015); Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015); Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995–96 (8th Cir. 2016). The Third Circuit has arguably cabined its doctrine in recent cases. *See Briseno*, 844 F.3d at 1127 n.6.

[17] *Carrera*, 727 F.3d at 305 (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)).

ing the best notice practicable."[18] Finally, "it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable."[19]

The district court rejected ConAgra's position and held that proof of administrative feasibility is unnecessary for class certification.[20] It emphasized that "ConAgra's argument would effectively prohibit class actions involving low priced consumer goods."[21] The court found the remaining Rule 23 requirements were satisfied and certified the class under Rule 23(b)(3).[22]

The Ninth Circuit affirmed.[23] The court joined the Sixth, Seventh, and Eighth Circuits in rejecting the Third Circuit's doctrine.[24] Writing for the panel, Judge Friedland[25] held that Rule 23 does not require or permit an administrative feasibility analysis.[26]

The panel focused entirely on administrative feasibility, noting the issue was one of first impression in the Ninth Circuit.[27] It first examined the text of Rule 23 and found that because its four prerequisites to certification do not include administrative feasibility, courts should presume the enumerated prerequisites "constitute[] an exhaustive list."[28]

The panel next assessed and rejected the Third Circuit's three rationales for including administrative feasibility as a standalone requirement.[29] Considering its first rationale, the panel reasoned that the need to mitigate administrative burdens was already captured by Rule 23(b)(3)(D), which requires that courts weigh "the likely difficulties in managing a class action."[30] To the Third Circuit's second point, the panel found that concerns about protecting absent class members

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[18] *Id.* at 305–06 (quoting *Marcus*, 687 F.3d at 593).

[19] *Id.* at 306 (quoting *Marcus*, 687 F.3d at 593).

[20] *In re ConAgra Foods*, 90 F. Supp. 3d at 970–71.

[21] *Id.* at 970 (quoting Order Denying Plaintiffs' Motion for Class Certification: Granting in Part and Denying in Part Defendant's Motion to Strike at 39, *In re ConAgra Foods*, 90 F. Supp. 3d 919 (No. 2:11-cv-05379-MMM-AGR)).

[22] *Id.* at 1035–36. Separately, the district court declined to certify an injunctive relief class under Rule 23(b)(2), finding plaintiffs could not satisfy Article III standing. *Id.*

[23] *Briseno*, 844 F.3d at 1123.

[24] *Id.* at 1123.

[25] Judge Friedland was joined by Judges Fletcher and Christen.

[26] *Briseno*, 844 F.3d at 1123.

[27] *Id.* at 1124–25. In a separate memorandum opinion, the panel affirmed the district court's decision with respect to ConAgra's remaining challenges. *See* Briseno v. ConAgra Foods, Inc., No. 15-55727, 2017 WL 53421 (9th Cir. Jan. 3, 2017).

[28] *Briseno*, 844 F.3d at 1125.

[29] *Id.* at 1127–32.

[30] *Id.* at 1127–28 (quoting FED. R. CIV. P. 23(b)(3)(D)). The court also noted that a heightened standard would "conflict[] with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns," *id.* at 1128 (quoting Mullins v. Direct Dig., LLC, 795 F.3d 654, 663 (7th Cir. 2015)), and would leave plaintiffs without a realistic alternative in low-value consumer class actions like the case at hand, *id.*

by ensuring individual notice were misguided, because Rule 23(c)(2)(B) does not require actual, individual notice, but merely the "best notice that is *practicable under the circumstances*, including individual notice to all members who can be identified through *reasonable effort*."[31] The panel also found the risk that fraudulent claim submissions would dilute a common fund to be nominal, because the claiming rates for consumer class actions are as low as ten to fifteen percent, and because individuals would be unlikely to perjure themselves by submitting false affidavits for small claims.[32] Responding to the Third Circuit's final point, the court found that defendants' due process rights are sufficiently protected by existing procedures.[33] The panel rejected *Carrera*'s assumption that defendants lack the opportunity to challenge fraudulent claims and highlighted the numerous means for mounting such challenges at the claims-administration stage.[34]

Briseno is well reasoned and persuasive. Neither due process nor Rule 23 requires administrative feasibility,[35] and the doctrine frustrates, rather than safeguards, the interests of absent class members. A freestanding administrative feasibility requirement would substitute a remote possibility of claim dilution with the complete certainty of recovering nothing where claims are too small to bring individually.[36]

However, the panel missed an opportunity to consider the wider harm this doctrine would cause. By barring cases like Briseño's, administrative feasibility would frustrate the deterrent value of consumer class actions. The Seventh Circuit has mentioned this problem,[37] but no court has given serious attention to how the inadequacy of alternative enforcement mechanisms would seriously undermine much of consumer protection law if administrative feasibility were a required component of class certification. Because courts and lawmakers are continuing to debate the merits of the Third Circuit's doctrine,[38] this implication of administrative feasibility deserves attention.

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[31] *Id.* at 1128–29 (quoting FED. R. CIV. P. 23(c)(2)(B)). The panel similarly observed that "the Due Process Clause does not require actual, individual notice in all cases." *Id.* at 1129.

[32] *Id.* at 1130.

[33] *Id.* at 1131–32.

[34] *Id.* The court also noted that, in circumstances where aggregate liability is known, a defendant's due process rights are not implicated because total liability is not affected by the identification of absent class members. *Id.* at 1132.

[35] Addressing *Carrera*'s argument about defendants' due process rights, the Seventh Circuit noted that even though "a defendant has a due process right not to pay in excess of its liability and to present individualized defenses . . . [i]t does not follow that a defendant has a due process right to a *cost-effective* procedure for challenging every individual claim to class membership." *See Mullins*, 795 F.3d at 669 (citing Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (finding similar procedural rights unavailable under antitrust law)).

[36] *See Briseno*, 844 F.3d at 1129.

[37] *See Mullins*, 795 F.3d at 668.

[38] *See* sources cited *infra* notes 68–70.

Rule 23(b)(3)'s core purpose is to enable the aggregation of small claims.[39] Where recovery amounts to a few dollars per person, as in many consumer-rights cases, the filing fee alone would exceed the damages award, and plaintiffs' attorneys, who typically work on contingent fees, would have no reason to litigate individual actions for trivial losses. Judge Posner has observed that "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[40]

While remunerating class members is an obvious benefit of claim aggregation, class actions, like all tort actions, simultaneously serve a parallel purpose: they deter potential defendants from misconduct.[41] Claim aggregation creates an incentive for attorneys to litigate actions that would otherwise be grossly unprofitable. In doing so, these lawyers act as private attorneys general, uncovering and prosecuting illegal conduct on behalf of the public interest.[42] By enlisting private attorneys to enforce consumer protection laws and offering a mechanism for disgorging liable parties of wrongful revenues, class actions encourage more cautious and transparent behavior.[43]

Many view deterring misconduct as more important than compensating class members with small claims.[44] Some believe deterrence is the *only* legitimate rationale for certain class actions.[45] Consider *Briseno* itself: there may be little reason to care whether class members recover the tiny amounts they each claim to have lost, but disgorging ConAgra of potentially millions of dollars in wrongful revenues has a clear benefit of deterring fraud. Had the panel required proof of ad-

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[39] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[40] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (emphasis omitted).

[41] *See* RUBENSTEIN, *supra* note 7, § 1:8 ("[C]lass actions deter misconduct by harnessing private attorneys general to assist in the enforcement of important public policies."); *see also* Hughes v. Kore of Indiana Enter., Inc., 731 F.3d 672, 677 (7th Cir. 2013) (Posner, J.) ("But even when as in this case the aggregate claim . . . is meager, [class] treatment will often be appropriate. A class action, like litigation in general, has a deterrent as well as a compensatory objective."); Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2389 (2015).

[42] See William B. Rubenstein, *On What a "Private Attorney General" Is — and Why It Matters*, 57 VAND. L. REV. 2129, 2167–68 (2004); *see also id.* at 2159–61.

[43] *See Hughes*, 731 F.3d at 677–78 ("[T]he damages sought by the class, and, probably more important, the attorney's fee that the court will award if the class prevails, will make the suit a wake-up call for Kore and so have a deterrent effect on future violations of the Electronic Funds Transfer Act by Kore and others. . . . [A] judgment would remind Kore to take greater care in the future to comply with federal law, however irksome compliance may seem." *Id.* at 678.).

[44] *See, e.g.*, Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 300 (1980).

[45] *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006) ("In reality, there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all." *Id.* at 105.).

ministrative feasibility, the class could not have been certified in light of the reality that consumers rarely keep itemized grocery receipts and would have no other means of proving their purchase.[46] The deterrent benefits would vanish, because "[w]ithout the class action mechanism, corporations . . . [would be] free to engage in false advertising, overcharging, and a variety of other wrongs without consequence."[47]

If an administrative feasibility requirement were to foreclose many consumer class actions, alternative enforcement mechanisms, such as public enforcement actions or *parens patriae* litigation, would be unlikely to replicate their deterrent effect. Part of the reason Congress encourages class actions is that federal and state entities often lack the resources or the incentive to bring their own enforcement proceedings.[48] This dynamic is especially salient for consumer protection litigation. Private attorneys have clear financial incentives to investigate potential consumer fraud, but government entities have limited funding and may be unable to make the same investments.[49] For example, the Food and Drug Administration has not defined "natural" for food-labeling purposes because of "resource limitations and other agency priorities" and instead polices mislabeling with ad hoc warning letters.[50] Certain statutes acknowledge similar difficulties by incentivizing citizen suits,[51] and public enforcers occasionally bring actions in response to misconduct uncovered by private attorneys.[52] This resource problem is so stark that "attorneys general sometimes hire private counsel to litigate state cases on a contingency basis."[53]

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[46] *See Briseno*, 844 F.3d at 1125.

[47] Byrd v. Aaron's Inc., 784 F.3d 154, 176 (3d Cir. 2015) (Rendell, J., concurring).

[48] *See* Rubenstein, *supra* note 42, at 2149–50, 2150 n.75; *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (noting in the antitrust context that "Congress created [a] treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.").

[49] *See, e.g.*, Michael L. Rustad, Commentary, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 517 (2001) ("Given that the states lack the financial and legal resources to litigate against the powerful tobacco companies, the trial lawyer's role has a continuing vitality. Private attorneys, acting as private attorneys general under the contingency fee system, made [a] historic tobacco settlement possible.").

[50] Sarah Valenzuela, Note, *Tracing the Evolution of Food Fraud Litigation: Adopting an Ascertainability Standard That Is "Natural,"* 34 REV. LITIG. 609, 618 (2015) (quoting Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993)).

[51] *See* Rubenstein, *supra* note 42, at 2152 & nn.87–89; *see also* 31 U.S.C. § 3730(b) (2012) (enabling qui tam suits for fraud against the federal government).

[52] Rubenstein, *supra* note 42, at 2152–53 (citing Rustad, *supra* note 49, at 518). While public enforcement actions also lead to private "piggyback" actions, these are most often antitrust and securities actions, rather than consumer or mass tort actions. *See id.* at 2150, 2152–53.

[53] Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 524 (2012).

But funding is only the tip of the iceberg. A major difference between public and private enforcers in the aggregate-consumer context is that private firms collect a percentage of a class's recovery — around thirty percent in some "all natural" labeling cases[54] — while government lawyers face no prospect of personal financial gain from this litigation. A government entity might view an adequate but less-than-optimal settlement as an acceptable outcome, particularly where litigation can last for over a decade and require significant investment and opportunity costs that public enforcers may be unable to bear.[55] By contrast, at least to a certain extent,[56] a private attorney who will earn a percentage of the recovery has a direct incentive to fight for a higher settlement and consequently to deter corporate misconduct.

Some of these problems may seem particular to unelected officials whose priorities are subject to institutional demands, rather than the direct demands of the consumer public. But even state attorneys general who must stand for reelection might not feel public pressure to zealously pursue enforcement actions where they have less costly and more lucrative means for garnering voter approval. For an attorney general, prosecuting a high-profile criminal action could be a much quicker and cheaper endeavor that yields an equal or greater amount of public support. The federal Speedy Trial Act[57] and similar state statutes[58] require that criminal trials begin no more than a few months after defendants are charged or first appear in court.[59] *Briseno*, by contrast, has been in court for almost six years.[60] Although a large recovery would make for a nice talking point, it might amount to very little per constituent if distributed,[61] and pushing for a higher recovery — perhaps a few dollars more per claimant, though tens of millions to the defendant in some cases — might not be worth the cost. But to a private attorney who keeps a percentage of the recovery, that extra effort could yield millions more in attorney's fees.

Government entities face a number of institutional challenges in enforcing consumer rights, and these challenges would be exacerbated if they bore this burden alone. Elected officials may be captured by

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54 *See, e.g.*, Larsen v. Trader Joe's Co., No. 11-cv-05188-WHO, 2014 WL 3404531, at *1 (N.D. Cal. July 11, 2014) (awarding twenty-eight percent of a settlement fund); Pappas v. Naked Juice Co. of Glendora, Inc., No. LA CV11-08276 JAK (PLAx), 2014 WL 12382279, at *13 (C.D. Cal. Jan. 2, 2014) (awarding twenty-eight percent of a settlement fund).

55 *See* Lemos, *supra* note 53, at 523.

56 *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 687 (1986) (describing limitations of this principle).

57 18 U.S.C. §§ 3152–3156, 3161–3174 (2012).

58 *See, e.g.*, N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2006).

59 *See, e.g.*, 18 U.S.C. § 3161(c)(1) (seventy days).

60 *See In re* ConAgra Foods, Inc., 90 F. Supp. 3d 919, 937 (C.D. Cal. 2015).

61 *See* Lemos, *supra* note 53, at 516, 521.

their donors and be unlikely to prosecute them.[62] Recent media reports have detailed how lobbyists, including food-industry lobbyists, have halted state enforcement actions.[63] But also troubling is the possibility that state attorneys general, as public officials, might be conflicted in balancing their duty to protect the public with the danger of harming corporations who employ many of those citizens.[64] These conflicts exist in today's enforcement actions, and government litigation can be a highly effective means for punishing corporate wrongdoing.[65] But eradicating private enforcement of many small-claims consumer class actions would offer potential defendants "a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies."[66]

Congress has specifically chosen class actions as a means for enforcing consumer protection laws,[67] and no alternative could readily replace them. A freestanding administrative feasibility requirement would be a startling step further than prior measures for mitigating coercive settlements. As federal courts,[68] Congress,[69] and the Federal Rules Advisory Committee[70] continue debating this doctrine, the stakes for stating the full case against it are high. Grafting an administrative feasibility requirement onto Rule 23 would eliminate a large subset of consumer class actions and disturb the important and inimitable role they play in protecting consumer rights.

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[62] *See id.* at 514.

[63] *See, e.g.*, Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?_r=0 [https://perma.cc/9FBL-RJHY] ("Attorneys general are now the object of aggressive pursuit by lobbyists and lawyers who use campaign contributions, personal appeals at lavish corporate-sponsored conferences and other means to push them to drop investigations, change policies, negotiate favorable settlements or pressure federal regulators . . . .").

[64] *See* Lemos, *supra* note 53, at 513–14; Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 729 & n.143 (2011).

[65] *See, e.g.*, Jack Ewing & Hiroko Tabuchi, *Volkswagen Set to Plead Guilty and to Pay U.S. $4.3 Billion in Deal*, N.Y. TIMES (Jan. 10, 2017), www.nytimes.com/2017/01/10/business/volkswagen-diesel-settlement.html [https://perma.cc/AT4S-6JYH].

[66] John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 227 (1983).

[67] *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 305–06 (2010).

[68] Not long after *Briseno* was decided, the Second Circuit issued an unpublished opinion affirming a denial of class certification on administrative feasibility grounds. *See* Leyse v. Lifetime Entm't Servs., LLC, Nos. 16-1133-cv, 16-1425-cv, 2017 WL 659894 (2d Cir. Feb. 15, 2017).

[69] On March 9, 2017, the U.S. House of Representatives passed H.R. 985, which would effectively codify *Carrera*. *See* H.R. 985, 115th Cong. § 1718(a) (2017).

[70] The Committee expressly declined to adopt an administrative feasibility requirement in a recent set of proposed amendments to Rule 23. *See* Memorandum from Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure, to Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules 10 (May 12, 2016), http://www.uscourts.gov/sites/default/files/2016-05-12-civil_rules_report_to_the_standing_committee_0.pdf [https://perma.cc/6HAV-LAQW].